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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 570

FREDERICK BLAUSTEIN, *Appellant*,

v.

CAESAR L. ARELLO, Substitute Trustee, *Appellee*.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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CAESAR L. AIELLO, Substitute Trustee, *Appellee*.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Maryland entered June 18, 1962. This judgment affirmed an order of the Circuit Court for Montgomery County which over-ruled exceptions to a sale under the purported authority of a deed of trust. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is not yet officially reported. It is unofficially reported at 182 A 2d 353. A copy of the opinion of the Court of Appeals of Maryland is attached hereto as Appendix A. The opinion of the Circuit Court for Montgomery County, Maryland, (Printed Record Extract, pp. 17-19) is not yet reported. A copy of this opinion is attached hereto as Appendix B.

JURISDICTION

Exceptions to the sale of the property involved in these proceedings were filed pursuant to Article 66, Annotated Code of Maryland, (1957), section 7.[1] The order of the Circuit Court for Montgomery County over-ruling the exceptions to the sale was entered November 21, 1961. The judgment of the Court of Appeals of Maryland was entered on June 18, 1962, and notice of appeal was filed in that Court on September 6, 1962. There was no petition for rehearing. The jurisdiction of the Supreme Court to review the judgment by direct appeal is conferred by Title 28, United States Code, section 1257(2). The principles announced by this Court in *Marcus* v. *Search Warrant of Property at 104 East Tenth Street, Kansas City, Missouri*, 367 US 717, 723, and in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 US 282, 290, sustain the jurisdiction of this Court to review the judgment on direct appeal.

THE STATUTES INVOLVED

The statutes involved in this case are Article 16, Annotated Code of Maryland, (1957), section 187A, and Section 148 of the Bankruptcy Act (11 USC § 548). Article 16, Annotated Code of Maryland, (1957), section 187A, provides as follows:[2]

---

[1] This section was repealed by Chapter 36, Section 1, Laws of Maryland, 1962, effective June 1, 1962.

[2] This section was repealed by Chapter 36, Section 1, Laws of Maryland, 1962, effective June 1, 1962. The procedure for substitution of trustees is currently covered by Rule W 77, Maryland Rules of Procedure. However, Rule W 77 (c) (3) permits the Circuit Court to substitute a trustee *ex parte*.

> The party or parties secured by any deed of trust in the nature of a mortgage may, after default under the terms thereof, petition the court, ex parte, in the foreclosure proceeding, for appointment of a substitute trustee or trustees to make sale under the power of sale contained therein when the trustees or one of them, is a nonresident of the State of Maryland, or not readily available to exercise the power, or for any other good and sufficient reason, and the court shall appoint a trustee or trustees who shall have all of the duties and powers conveyed to the trustee or trustees named in the original instrument.

Section 148 of the Bankruptcy Act (11 USC § 548) provides:

> Until otherwise ordered by the judge, an order approving a petition [for the reorganization of a corporation] shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership, and of any act or other proceeding to enforce a lien against the debtor's property.

QUESTIONS PRESENTED

I

A state statute requires the court to appoint a substitute trustee under a deed of trust in the nature of a mortgage without notice to the owner of the property. The trustee originally named in the deed of trust is without legal authority to exercise the power of sale, but the statute is construed to grant the substitute trustee such power of sale. Does the statute, so construed, deprive the owner of a property right without due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

II

Does the automatic stay of foreclosure proceedings provided for by Section 148 of the Bankruptcy Act (11 USC § 548) render void a foreclosure sale where, although the property has been conveyed by order of the court having jurisdiction of the corporate re-organization, that court has not expressly authorized the foreclosure sale?

STATEMENT

Forest Knolls, Inc., was a Maryland corporation engaged in the business of developing real estate in Montgomery County, Maryland, for residential purposes. (E. 1)[3]. On September 30, 1958, this corporation executed a deed of trust covering, *inter alia*, Lots 14, 15, 17, and 18, Block L, Forest Knolls Subdivision, Montgomery County, Maryland. This deed conveyed the property to Suburban Trust Company, a corporation, as trustee, to secure the payment of a debt to Home Federal Savings and Loan Association. (E. 1) The four specified properties were conveyed to secure the repayment of $84,000 to be advanced in the future. The note recited that the debt was due nine months after the date of the deed of trust.

On April 8, 1960, an involuntary petition for the reorganization of Forest Knolls, Inc., was filed in the United States District Court for the District of Maryland, which petition was approved April 28, 1960. (Exceptant's Exhibit No. 1, E. 19)

[3] References in this Jurisdiction Statement are to the printed Extract of Record, the printed document upon which the proceedings in the Court of Appeals of Maryland were heard. Rule 838, Maryland Rules of Procedure, 1961 edition.

The properties here in question were a part of the debtor's estate at the time of the approval of the petition for re-organization and were dealt with by the District Court on several occasions. For example, by an order dated April 12, 1961 (Trustee's Exhibit No. 1, E. 30) the Court authorized the trustee in the re-organization proceeding to abandon three of the four properties, and expressly authorized Herman Eig, holder of the note secured by a second deed of trust, to proceed with his foreclosure. On May 20, 1961, the District Court rescinded its order of April 12, 1961. (Exceptant's Exhibit No. 2, E. 26) On June 16, 1961, the trustee was authorized and directed to convey by quit-claim deed all right, title and interest of said Trustees and of the estate in the properties to Frederick Blaustein, the appellant, subject to all alleged liens. (E. 29)

On August 24, 1961, as an initial step in the foreclosure proceedings here challenged, Home Federal Savings and Loan filed an *ex parte* petition to ratify its substitution of Caesar L. Aiello as trustee (E. 7) and on the same day, the Circuit Court for Montgomery County entered its order confirming that substitution. (E. 11)

Under the purported authority of that *ex parte* order, Caesar L. Aiello, substitute trustee, the appellee here, sold the properties at public auction. Lot 14, Block I, was sold to one Samuel Leibowitz, and the remaining properties were sold to the creditor. (E. 12-14) An order *nisi* confirming the sale "unless cause to the contrary be shown" within a specified time was entered by the Clerk of the Court. (E. 14)

Within the time specified, Blaustein filed exceptions to the sale. (E. 15, 16) These exceptions, which were

Blaustein's first opportunity to be heard, raised, among other challenges to the validity of the sale, the following:

> 2. The sale herein was made by Caesar L. Aiello, who was substituted as Trustee. The substitution of said Aiello was made without any notice to your exceptant, and deprived your exceptant of rights and interests in the said property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.
>
> . . . . . .
>
> 4. The said sale was made in violation of the provisions of Section 148 of the Bankruptcy Act, (11 USC 547). Said statute forbids any person to initiate or proceed with any foreclosure against the property of a corporation as to which a petition for reorganization has been approved.
>
> 5. A petition for the reorganization of Forest Knolls, Inc., a corporation was approved by the United States District Court for the District of Maryland on or about April 8, 1960.
>
> 6. *No order permitting* the foreclosure herein has ever been made by the said United States District Court for the District of Maryland, nor by any judge thereof.

The Court of Appeals of Maryland recognized that the challenge by the exceptant was to the validity of Article 16, Annotated Code of Maryland (1957), section 187A. It said (182 A 2d 343, 356, 357):

> . . . the exceptant contends that the appointment of a substitute trustee without notice to him or an opportunity to be heard was a violation of

his constitutional right to due process. Such is not the case.

* * * * * * * * * *

But, as we read these sections, neither of them required notice to the debtor under the circumstances of this case. Section 187, which does not in any way concern the issue presently before us, provides for notice to the party who is rquired to pay the indebtedness only in the event that the trustee is dead; otherwise notice is required to be given only to the trustee sought to be removed. And § 187A, in providing for the filing of an *ex parte* petition, certainly implies that action may be taken without notice to anyone.

THE QUESTIONS ARE SUBSTANTIAL

I. The Challenged Statute Required the Court to Make a Serious and Substantial Change in the Property Rights of the Appellant Without Any Notice to Him, and the Order Substituting the Trustee Entered in Accordance With That Statute Was a Violation of the Fundamental Requirement of the Due Process Clause

This appeal raises questions involving the basic requirement of procedural due process, and the decision of the Court of Appeals of Maryland is patently contrary to the decisions of this Court which make notice and opportunity to be heard the indispensable requirement of procedural due process. Mr. Justice Jackson, speaking for this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 313, observed, "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there be no doubt that at a minimum they require that deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case."

The same principle was restated in *Lambert* v. *California*, 355 US 225, 228, where this Court said:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen can defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

The principle that "a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight . . ." *Roller* v. *Holly*, 176 US 398, 409.

Nor can it be seriously challenged that Blaustein, as the owner of the property, had a substantial interest in the identity of the trustee. A trustee under a deed of trust has the duty of impartiality to the owner of the land as well as to the creditor. *Waters* v. *Talbott*, 165 Md 70, 75, 166 A 431, 433. He is not merely a nominal party. *Hardy* v. *Gibson*, 213 Md 493, 133 A 2d 401, 405. In describing the position of a trustee under a deed of trust, the Maryland Court of Appeals said in *Barrick* v. *Horner*, 78 Md 253, 27 A 1111, 1112:

> . . . but where the power [of sale] is conferred upon a third person, who has no interest in the estate, it is a collateral power. (Reid v. Gordon, 35 Md. 174) The selection of the donee presumably being made, in that case, with reference to the special skill and ability of the individual selected, or by reason of the personal confidence reposed in him by the parties, it is not an incident of the estate conveyed, does not pass on the decease of the donee to his representatives, and can be exec-

...rted only by the person named, (Association v. Lowdermilk, 50 Md. 179;) "for a matter of personal confidence is not to be extended beyond the express words and clear intention of the settlor." (Lewin, Trusts, marg. p. 604)

In this case, the Court below, under the purported authority of the challenged statute, did much more than merely substitute a trustee. It created a power of sale where none, in law, had existed. The original trustee was a corporation, which, under the law of Maryland, may not exercise a power of sale. *Frostburg Building Association* v. *Lowdermilk*, 50 Md 175; *Hardy* v. *Gibson*, 213 Md 493, 133 A 2d 401, 406. Consequently, the deed of trust in legal effect contains no power of sale. *Queen City Building Association* v. *Price*, 53 Md 397, 400. The Court of Appeals of Maryland denied the constitutional protection claimed by the appellant in part upon the assertion that the original grantor had agreed to the substitution of any one selected by the creditor, but this can not be sustained in the light of the express language of the instrument. That language grants the right to substitute a trustee having "the same powers, rights, and duties as the trustee so superseded had under this deed of trust." (E. 6) Consequently, it was the order of the Circuit Court, and that order alone, which created the power of sale in the substitute trustee. To have created this power without any notice or opportunity for the appellant to be heard is, we respectfully submit, a clear denial of appellant's rights under the Due Process Clause.

II. The Foreclosure Proceedings in the Absence of an Order of the United States District Court Authorizing Them, Raise an Important and Substantial Issue as to the Meaning of Section 148 of the Bankruptcy Act Which This Court Has Not Decided, and Should Decide

A foreclosure which is attempted in violation of a statutory stay is a nullity. Cf *Kalb v. Feuerstein*, 308 US 433, 438, 439. The stay provided by Section 148 of the Bankruptcy Act is self-executing and requires no order, other than that approving the petition for reorganization, to make it effective. 11 *Collier on Bankruptcy* (14th edition), Paragraph 6.12, p. 1798.

Unquestionably, the property involved in these proceedings, was at the time of the filing of the petition, a part of the property of the debtor, and in the absence of any order permitting it, any attemps to foreclose any lien against the property was prohibited by the statute.

The decision of the Court of Appeals of Maryland assumes that any act divesting the estate of title to the property removes the property from the protection of this statute. This, we believe, is an unwarranted interpretation of the statute, and is contrary to the purpose of the statute. The transfer of the debtor's property is a useful and frequently used instrument for the reorganization of the insolvent corporation. The use of this device would be impossible if the mere fact that the trustee had divested himself of the title were to permit the creditors to resume a scramble for the property.

The holding of the Court of Appeals of Maryland also raises an important issue relating to the protec-

tion of the bankruptcy court's jurisdiction. The Court of Appeals of Maryland emphasizes the fact that the conveyance was subject to all *alleged* liens. This construction ignores the more significant direction of the Court that the trustee was to convey to Blaustein *all* of his right, title, and interest in the property. The most important right that the trustee had in this property was that of preventing foreclosure unless and until the District Court, after hearing, had permitted such action. The fact in this case is that the mortgage creditor was, and is, attempting to secure for itself the value of improvements created by mechanics and others. (E. 30-43) The trustee had abandoned his efforts to preserve anything for other creditors. Blaustein made available to the trustee funds for general creditors of the estate. It needs no imagination to conclude that his motivation was the belief that he succeeded to the trustee's right to resist the foreclosure unless and until the issue had been explored by the District Court, to whose discretion stays are committed. *Central Hanover Bank & Trust Co. v. Callaway*, 137 F 2d 592, 595 (CCA 5, 1943); *Central States Life Insurance Co. v. The Kephart Co.*, 80 F 2d 754, 759, *cert. denied*, 298 US 687.

The need to protect the jurisdiction of the District Court is obvious. If, after hearing the appellant, it concluded that the foreclosure should be permitted, the appellant would have no complaint. But the action of the Court of Appeals of Maryland, unfamiliar as it was with the background situation, in interpreting the order of the District Court clearly invades the jurisdiction of that Court.

CONCLUSION

The questions presented by this appeal are substantial. They should be decided by this Court after full consideration. The Maryland statute violates the Due Process Clause. The judgment of the Court of Appeals of Maryland invades the statutory and constitutional control of the District Court over bankruptcy proceedings. The judgment of the Court below should be reversed.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals of Maryland

This is an appeal from an order of court overruling the exceptions to a foreclosure sale of real estate situated in the Forest Knolls Subdivision[1] in Montgomery County. The sale was made by Caesar L. Aiello (substituted trustee) under a deed of trust from Forest Knolls, Inc. (debtor), to Suburban Trust Company (original trustee) to secure the payment of a debt due Home Federal Savings and Loan Association (creditor). The exceptions were filed by Frank Blaustein (exceptant).

The corporate debtor, which was engaged in the business of developing real estate for residential purposes, executed the deed of trust on the properties in question in September of 1958. But, when an involuntary petition for the reorganization of the debtor corporation was filed in April of 1960, the encumbered property became a part of the estate of the bankrupt corporation.

Subsequently, in June of 1961, the trustee in the bankruptcy proceeding to reorganize the debtor corporation "was authorized and directed to sell *subject to all liens* [emphasis supplied], all right, title and interest" of the trustee and the estate in bankruptcy in the encumbered property (and certain other properties) by delivering to the exceptant a quitclaim deed for such property. The transaction was completed and the deed was delivered in due course. The record shows that the creditor had knowledge of the transaction because it had subsequently inquired of the exceptant (through his attorney) what disposition of the "first trust lien" he proposed, but apparently the exceptant did not reply.

In August of 1961, the creditor, by a duly executed and recorded deed of appointment, substituted Caesar L. Aiello

[1] The real estate in question is described as Lots Nos. 14, 15, 17 and 18 in Block L of the Subdivision.

as trustee in the place and stead of the original trustee, and, on the *ex parte* petition of the creditor, the Circuit Court for Montgomery County ratified and confirmed the substitution. And, while the record is silent as to whether the exceptant had actual notice of the substitution of trustee, it is not controverted that notice of the sale of the encumbered property was duly advertised pursuant to Maryland Rule 1391 e 1(b), now codified as Rule W74 a 2. The foreclosure sale was held on September 22, 1961.

The exceptant contends: (i) that the foreclosure proceeding, absent an order of the District Court of the United States for the District of Maryland authorizing it, violated § 148 of the Bankruptcy Act and that the sale is therefore null and void; and (ii) that the appointment of a substitute trustee without notice to the exceptant violated his constitutional right to due process.

(i)

In citing § 148 of the Bankruptcy Act (11 U.S.C.A. § 548) providing in pertinent part that "[u]nless otherwise ordered * * * an order approving a petition [for reorganization] shall operate as a stay * * * of any act or other proceeding to enforce a lien against the debtor's property" the claim here, on the theory that the stay provided is self-executing, is that the approval of the reorganization proceeding had the effect of placing all of the property of the bankrupt debtor under the exclusive jurisdiction of the bankruptcy court and of effectively preventing the enforcement of a lien on such property in a state court unless and until the bankruptcy court passed an order authorizing such action.

While we do not disagree with the correctness of the claim as an abstract proposition of law, we think it is devoid of substance under the circumstances in this case. For here the property with which we are concerned was clearly not that of the debtor at the time the foreclosure

proceeding was instituted by the substituted trustee. This is so because once a sale made by a trustee in bankruptcy is confirmed by an order of the bankruptcy court, the sale becomes complete and whatever interest or estate the bankrupt debtor formerly had in the property passes from the trustee and the estate of the bankrupt to the purchaser. See *Coulter* v. *Blieden*, 104 F. 2d 9 (8th Cir. 1939), *cert. den.* 308 U.S. 583 (1939). And see *In Re Strunks Lane and Jellico Mountain Coal & Coke Co.*, 64 F. Supp. 731 (D.C. Ky. 1946). Cf. *Crane* v. *Crane*, 173 N.E. 353 (Ill. 1930). The cases relied on by the exceptant to support his contention that an order of the bankruptcy court was a prerequisite to a valid foreclosure in a state court do not so hold on facts comparable to those in this case.[2]

On the contrary, we think it is clear that the jurisdiction, which the circuit court had over the property in question before it came under the exclusive jurisdiction of the bankruptcy court in the course of the reorganization proceeding, was effectively restored to the circuit court when the bankruptcy court, in ordering and confirming the sale to the exceptant, thereby divested itself of any further jurisdiction over the property. See *Beall* v. *Walker*, 26 W. Va. 741 (1885), where it was held that property sold subject to liens in a bankruptcy court passed out of the jurisdiction of that court, and that the sale had the effect of restoring the authority of the state court to en-

[2] The holding in *In Re Long Island Properties, Inc.*, 40 F. Supp. 611 (S.D. N.Y.) was merely to the effect that a foreclosure sale in a state court, after the entry of an order in a reorganization proceeding restraining such sale, was void for want of jurisdiction. And the holdings in *Central Hanover Bank & Trust Co.* v. *Callaway*, 135 F. 2d 592 (5th Cir.), and *Central States Life Ins. Co.* v. *The Kojlar Co.*, 80 F. 2d 754 (8th Cir.), were only to the effect that the ending of a stay prohibiting the commencement or continuation of actions against a debtor was within the discretion of the bankruptcy court. None of the three concerned property sold by a bankruptcy trustee subject to a lien.

force the liens. See also *J. M. West Lumber Co.* v. *Lyon*, 116 S.W. 652 (Tex. Civ. App. 1909), where it was held that when a bankruptcy court has ordered and confirmed a sale of property under a mortgage, its jurisdiction was at an end and that it could not subsequently order a sale thereof under a purported vendor's lien.

In *Gotkin* v. *Korn*, 182 F. 2d 380 (D.C. Cir. 1950), where there had been a sale of chattels of a bankrupt by his trustee subject to existing liens and a subsequent action for a declaratory judgment as to the respective rights of the lienor and the purchaser of the chattels sold, the Court of Appeals, in reversing the district court, pointed out (at p. 382):

> "[T]hat when, as here, the bankruptcy court chooses to sell encumbered property subject to liens, it elects to sell only the bankrupt's equity therein and so, in effect, declines to exercise its exclusive power to deal with the liens, and relegates their holders to the enforcement remedies which would have been available to them, had the lienee's bankruptcy not occurred."

See also *Nixon* v. *Michaels*, 38 F. 2d 420 (8th Cir. 1930) [third] party cannot come into bankruptcy court merely to litigate rights even though property involved may once have been part of bankrupt estate]; and *In Re Reading Hat Mfg. Co.*, 224 Fed. 786 (E.D. Pa. 1915) [if order of sale does not divest lien, purchaser takes title subject to existing liens, and must pay lien or otherwise arrange with creditor to retain property]. And compare the cases of *Henrie* v. *Henderson*, 145 Fed. 316 (4th Cir. 1906), and *In Re Oak Park Cleaners and Dyers*, 125 F. 2d 420 (7th Cir. 1942), pointing out that a bankruptcy court has only a limited jurisdiction that should not extend beyond the necessities of the case.

In *In Re Krull*, 295 Fed. 520 (E.D. N.Y. 1923), where a trustee in bankruptcy sold the interest of a bankrupt in the unexpired term of a lease and the title thereto was

thereafter attacked in another court by the owners of the premises, the district court pointed out that the bankruptcy court had no further control over the rights sold and could not prevent another tribunal from proceeding to determine the rights of the parties. And cf. *Smith* v. *Chase National Bank*, 84 F. 2d 608 (8th Cir. 1936).

We hold that the circuit court had jurisdiction to entertain the foreclosure proceeding.

(ii)

Because the notice requirements that are a part of the provisions of Code (1957), Art. 16, § 187,[3] which was in effect at the time the deed of trust was executed, were omitted from the provisions of § 187A (of Art. 16),[4] which became effective after the execution of the deed of trust, the exceptant contends that the appointment of a substitute trustee without notice to him and an opportunity to be heard was a violation of his constitutional right to due process. Such is not the case.

Apparently the claim is that § 187 required that the exceptant (as substituted debtor) should have been given notice, either personally or by publication, of all matters concerning or pertaining to the deed of trust, and that § 187A is invalid because it did not provide a similar provision. But, as we read these sections, neither of them required notice to the debtor under the circumstances in this case. Section 187—which does not in any way concern the issue presently before us—provides for notice to the party who is required to pay the indebtedness only in

[3] Section 187 relates to the removal of a trustee (and the appointment of a new one) when the original trustee dies, resigns or fails to act. See also Rule W 77 a, b.

[4] Section 187A relates to the removal of a trustee (and the appointment of a substitute when a condition in the deed of trust is in default) who fails or neglects to act, or whenever there is any good and sufficient reason for removal. See also Rule W 77 c.

the event that the trustee is dead; otherwise notice is required to be given only to the trustee sought to be removed. And § 187A, in providing for the filing of an *ex parte* petition, certainly implies that action may be taken without notice to anyone. In any event, it is provided by Rule W77 q.1 (which supersedes Ch. 466 of the Laws of 1959 that had added § 187A to Art. 16 of the Code)[1] that the procedure set forth in subsection c shall not supersede or nullify the procedure for the removal or substitution of a trustee which is provided for in a deed of trust instrument, regardless of whether the instrument was executed prior or subsequent to the effective date of the rule.

There was no requirement for notice to the debtor. And, under the circumstances in this case, there has been no infringement of any rights of the exceptant. The action taken, all of which was a matter of public record, was in strict compliance with a right or privilege conferred upon the creditor by the terms of the deed of trust and on the authority granted by statute and rule. The exceptant stood in the shoes of the bankrupt debtor, which had agreed to a substitution of trustees at any time without requiring that it be notified thereof. As a general proposition the right to notification may be waived by the person for whose protection it is exactable; it is on this theory that contractual provisions for notification may be waived by the person for whose benefit they might have been included in the contract. 2 *Merrill on Notice*, §§ 875, 876. There was no reason why notifications waivable under this principle should not include one concerning the substitution of trustees in a deed of trust. Cf. *Knapp v. Anderson*, 89 Md. 189, 42 Atl. 923 (1899).

[1] In the editor's note to subsection c of Rule W77 it is stated that the main difference between the statute and the rule is that the rule makes the action to be taken *discretionary* with the court while the statute appears to make the removal *mandatory* in all cases.

We hold that there was no denial of the exceptant's constitutional right to due process.

Since we find no error in the matters complained of, the order of the lower court, overruling the exceptions and ratifying and confirming the foreclosure sale, will be affirmed.

ORDER AFFIRMED; THE APPELLANT TO PAY THE COSTS.

APPENDIX B

Opinion of the Circuit Court for Montgomery County

This matter came on for hearing upon exceptions to sale of real estate, default having occurred under the terms of a Deed of Trust and following report of sale on September 22, 1961, and Order Nisi. The property consisted of Lots numbered 14, 15, 17 and 18 in Block "L" of Forest Knolls Subdivision of Montgomery County, and was made by Caesar L. Aiello. The said Aiello was appointed substitute trustee by Deed of Appointment from the Corporation secured and recorded among the Land Records of this County on August 24, 1961, in Liber No. 2880, Folio 20.

The exceptant is one Frederick Blaustein, owner of the property sold and he first alleges that he had no notice of the substitution of said Aiello as said trustee. This substitution was a matter of public record (Trustee's Exhibit No. 2) and the Court further suggests that, if any notice would be ordinarily required it was waived in the body of the Trust instrument.

The exceptant next claims that when the Deed of Trust was filed for record the statement as to "consideration for the debt secured thereby" was omitted and that, therefore, the trust is subordinate to the rights and interests of the exceptant as a subsequent purchaser. Mortgages and Deeds of Trust are for some purposes governed by the

same legal provisions. Requirement of Sec. 30 of Art. 21 of the Annotated Code of Maryland providing that no mortgage shall be valid except as between the parties without an affidavit by the mortgagee as to the consideration, has been held applicable only to technical mortgages and not to Deeds of Trust (Kinsey v. Drury, 146 Md. 227).

The exceptant also complained that the sale was made in violation of the provisions of the U. S. Bankruptcy Act, claiming that Forest Knolls, Inc., grantor in the subject Deed of Trust, is in bankruptcy and that no Order permitting the foreclosure was given by the United States District Court handling this bankruptcy (Exceptant's Exhibit No. 1). The Court does not feel that any such authority was necessary at the time of this foreclosure. On June 16, 1961, Clyde E. Bourke, Trustee in Bankruptcy for Forest Knolls, Inc. was, upon his Petition, authorized by the Chief Judge of the United States District Court for the District of Maryland to sell all right, title and interest of said Trustee in the four lots here involved unto Frederick Blaustein upon payment of sums as set forth in said Order. This is the same Frederick Blaustein who has now entered exception to this sale. It is also interesting to note that said Order states that the said Blaustein was "the formerly undisclosed principal of Albert A. Rapoport, Esq." and that Mr. Rapoport had received a letter from the Executive Vice President of Home Federal Savings and Loan Association on July 3, 1961, which reads as follows:

> "It has come to our attention that you or your clients have recently acquired an interest in Lots 14, 15, 17 and 18 in Block L, Forest Knolls. Please promptly advise what disposition of our first trust liens is proposed."

(Exceptant's Exhibit No. 3)

The first advertisement of this sale was not until August 31, 1961.

In accordance with the above it is, thereupon, this 17th day of November, 1961, by the Circuit Court for Montgomery County, sitting as a Court of Equity

Ordered that the exceptions to sale be denied; and that the sales made by Caesar L. Aiello, Substitute Trustee to Samuel Leibowitz and Home Federal Savings and Loan Association, and reported in this cause, be, and same are, finally ratified and confirmed, no cause to the contrary having been shown, although notice appears to have been given as heretofore required.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 570

FREDERICK BLAUSTEIN, *Appellant*,

v.

CAESAR L. AIELLO, Substituted Trustee, *Appellee*.

On Appeal from the Court of Appeals of Maryland

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 570

FREDERICK BLAUSTEIN, *Appellant*,

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CAESAR L. AIELLO, Substituted Trustee, *Appellee*.

On Appeal from the Court of Appeals of Maryland

MOTION TO DISMISS

STATEMENT OF THE CASE

Forest Knolls, Inc., was engaged in the business of developing real estate for residential purposes. On September 30, 1958, this corporate debtor executed a deed of trust on the properties in question (Lots 14, 15, 17, and 18 in Block L of the Forest Knolls Subdivision) to Suburban Trust Company, as Trustee, to secure the payment of a debt due Home Federal Sav-

ings and Loan Association. Later, this encumbered property became a part of the estate of the bankrupt Forest Knolls, Inc., when an involuntary petition for its re-organization was filed and approved in April, 1960.

On June 16, 1961, the trustee in the re-organization proceedings was authorized and directed to sell *subject to all liens*, all right, title and interest of the trustee and the estate in bankruptcy in the encumbered properties by delivering a quitclaim deed to Frederick Blaustein, the appellant. (E. 29).

Subsequent to the completion of this transaction, Home Federal Savings and Loan Association, the creditor, by a duly executed and recorded deed of appointment in August, 1961, substituted Caesar L. Aiello, appellee, as trustee in the place and stead of Suburban Trust Company. The creditor's petition to ratify the substitution of trustee was ratified and confirmed by the Circuit Court for Montgomery County on August 24, 1961. (E. 11).

Foreclosure proceedings were instituted thereafter by the substituted trustee and the foreclosure sale was held on September 21, 1961. The appellant filed exceptions to these proceedings and after a full hearing, the Circuit Court for Montgomery County overruled them. This decision was affirmed by the Court of Appeals of Maryland. In a unanimous opinion, it held that the state foreclosure proceedings in no way conflicted with the provisions of the Bankruptcy Act and that under the terms of the deed of trust, there had been no denial of due process.

From this decision of the Court of Appeals of Maryland, the appellant now seeks review by this Court.

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. Opinion Rests on Adequate Non-Federal Grounds and Would Not Be Affected By Decision on Federal Question

The jurisdiction of the Supreme Court in this case is based upon Title 28, United States Code, section 1257(2) which allows a direct appeal whenever a state statute is challenged as repugnant to the Constitution of the United States. The claim of the appellant rests upon the assertion that the Maryland statute which allows the ex parte substitution of trustees violates the due process clause of the fourteenth amendment of the Constitution. To be specific, it is now argued by the appellant that failure to notify Mr. Blaustein of the substitution of Caesar L. Aiello as substituted trustee under the deed of trust was a denial of due process. An analysis of this case however will disclose that this allegation by the appellant is not justified by the facts.

It has been a basic and longstanding policy of this Court to refuse to consider any constitutional questions raised for the sake of jurisdiction but not required for the full and final disposition of a controversy. It has wisely declared that it will not make any unnecessary constitutional determinations. *City of Meridian* v. *Southern Bell T. & T. Co.*, 358 U.S. 639 (1959). In other words this Court properly should deny an appeal based upon the challenge of a state statute when the clause in question was not an essential element of the decision.

In the instant case, the Court of Appeals of Maryland, 229 Md. 131, 138, held that "the right to notification may be waived by the person for whose benefit it is exactable: it is on this theory that contractual pro-

visions for notification may be waived by the person for whose benefit they might have been included in the contract." Clearly the appellant purchaser stood in the shoes of the bankrupt debtor which had agreed in precise, unequivocal terms to a substitution of trustees at any time without requiring that it be notified thereof. The deed of trust expressly provides (E.6):

> "And it is further covenanted and agreed that the holder of the note secured by this deed of trust or assigns shall have power to be exercised at any time hereafter to substitute a trustee or trustees in the place of the trustee herein named by an instrument in writing duly executed, acknowledged and recorded among the Land Records as provided by law, and that when such an instrument is recorded all of the estate of the trustee thus superseded shall determinate and the title to the hereinbefore described land heretofore vested in such trustee shall cease and terminate and shall be vested in the trustee or trustees named as its successors, who shall have the same powers, rights and duties as the trustee so superseded had under this deed of trust. The exercise of this right to appoint a successor trustee, no matter how often exercised shall not be deemed an exhaustion of said right."

Thus appellant's right to notice had been waived as a matter of contract law and such waiver was authorized under both the general law and the specific Maryland statute which is now being challenged. Since the appellant had no legal right to notice, by the terms of the deed of trust, notice was denied. Inasmuch as the state statute, which appellant argues was a denial of his constitutional right to due process, was not an essential element of the decision, this appeal should be dismissed. *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118 (1939).

Nor does the allegation that the appellee, Mr. Aiello, had no power of sale as the substituted trustee have any bearing upon the question in issue. The appellant has stated that a corporation under Maryland law may not exercise a power of sale. We agree that this is a correct legal proposition but this in no way prevented Mr. Aiello, the substituted trustee, from making a sale. The deed of trust gave him the "same powers" as the previous trustee. Obviously these "same powers" were the broad general powers, one of which was a power of sale granted by the original grantor in the trust instrument and the individual trustee is not limited by any peculiar disability of a prior trustee.

In *Maslin* v. *Marshall*, 94 Md. 480, 51 A. 85 (1902), the original trustees assigned a mortgage to a corporation which assigned it to Maslin who exercised the power of sale contained in the mortgage instrument. Here the Court of Appeals, after referring to the *Frostburg* and *Queen City* cases cited by the appellant, said that assuming the corporation "was incapable of executing the power, it does not follow that when the mortgage came to be vested in the appellee (Maslin) who is entirely unaffected by such incapacity, he should be deprived of what was intended to be part of the mortgage security. The inability of the Safe Deposit Company to execute the power of sale did not arise from any defect in the power, but from the infirmity of the company itself. . . . It [the power of sale] must upon principle be held to have been exercisable by all such assignees except insofar as they may by reason of their own disability have been incapable of executing it."

Thus, if appellant's argument was carried to its logical conclusion it would result in the contention that

after a trustee, who could not exercise any powers because of his insanity, was removed, his successor would also be unable to act. Such a conclusion is obviously erroneous and contrary to the intent of the parties to the trust instrument and the statement of appellant that the court created a power of sale where there was none previously is untenable and wholly without merit.

At any rate appellant is barred from making any such assertion at this time. This question was neither raised nor preserved in the trial in the Circuit Court for Montgomery County, Maryland, nor was it presented in the Court of Appeals of Maryland. The Supreme Court has steadfastly held in the past that an argument cannot be presented on appeal for the first time. *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190 (1925); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940).

It is therefore strongly urged that this motion to dismiss be granted on the grounds of lack of jurisdiction since there is no merit to the allegation that the Maryland statute violates the United States Constitution. Under the facts of this case it would be unnecessary and inappropriate at the present time to render a judicial determination of the issue raised by the appellant. In short, the decision below rested on adequate non-federal grounds and this appeal should be dismissed since the constitutional issue is not ripe for review. *City of Meridian v. Southern T. & T. Co.*, *supra*.

B. Mere Assertion of Substantial Federal Question Is Not in Itself Sufficient to Give the Supreme Court Jurisdiction Without a Plausible Foundation for Such Claim

Appellant suggests that the foreclosure proceeding in the state court, in the absence of an order of the United States District Court specifically authorizing the proceedings, raises an important and substantial issue as to the meaning of Section 148 of the Bankruptcy Act and the jurisdiction of the bankruptcy court. This argument by the appellant is wholly without foundation. The Court of Appeals of Maryland in its opinion, based on the record, holds that the bankruptcy court in ordering and confirming the sale of the subject property to the appellant, had divested itself of any further jurisdiction over the property. This finding of fact does not contravene or interpret any section of the Bankruptcy Act and certainly does not invade or limit the jurisdiction of the bankruptcy court. Clearly, the naked assertion of an important and substantial federal question does not constitute a plausible foundation for such claim.

It is well established law that a bankruptcy court may in the interest of general creditors regulate the method of enforcing pre-existing liens against a debtor's property in order to realize as much as possible from the bankrupt's equity. It may sell the property free from the lien and award the lien holder a preferential payment representing the proceeds of his lien, *Re Oneco Milling Co.*, 109 F. 866 (5th Cir. 1901) or the bankruptcy court may, in its discretion, sell merely the bankrupt's equity in the property, that is, sell the property subject to encumbrances, as in the instant case, and leave the lienor to enforce his liens upon the

property by appropriate proceedings. *Re Gerry*, 112 F. 958 (E.D. Pa. 1902).

In the instant case the trustee in bankruptcy found that it was in the best interests of the estate and its creditors to sell the property of the bankrupt subject to liens and encumbrances, and the secured creditors left to their remedies against the property. In his petition (E.42) he stated

> "9. Your petitioner does not believe that other offers will be received for these six lots. He therefore, considers these offers to be in the best interests of this estate and of its creditors.
>
> "Wherefore, your petitioner prays that this Court enter an order authorizing the sale of Block B, Lot 18, Block H, Lot 38, and Block L, Lots 14, 15, 17 and 18, subject to liens and encumbrances, by giving to the undisclosed principal of Albert A. Rapoport, who shall be disclosed prior to the passage of the order prayed, a quitclaim deed or quitclaim deeds therefore. . . . ."

The order of June 16, 1961, (E.29) of the United States District Court for the District of Maryland provided that the trustee "is hereby authorized and directed to sell subject to all alleged liens, all right, title, and interest of said trustees and of this estate in . . . Block L, Lots 14, 15, 17 and 18, in Forest Knolls Subdivision, Montgomery County, Maryland, by delivering unto Frederick Blaustein, . . . a quitclaim deed or quitclaim deeds for said properties . . . ."

Since the effect of this was the sale of whatever title the bankrupt had to the purchaser, it is strongly urged that the Court of Appeals of Maryland did not err in its findings. In a unanimous opinion, the Court held it was clear that the jurisdiction which the circuit

court had over the property in question, before it came under the exclusive jurisdiction of the bankruptcy court in the course of the reorganization proceeding, was effectively restored to the circuit court when the bankruptcy court, in ordering and confirming the sale to the appellant, thereby divested itself of any further jurisdiction over the property. *Beall* v. *Walker*, 26 W. Va. 741 (1885); *J. M. West Lumber Co.* v. *Lyon*, 116 S.W. 652 (Tex. Civ. App. 1909).

In *Gotkin* v. *Korn*, 86 U.S. App. D.C. 372, 182 F. 2d 380 (1950) where there had been a sale of chattels of a bankrupt by his trustee subject to existing liens and a subsequent action for a declaratory judgment as to the respective rights of the lienor and the purchaser of the chattels sold, the Court of Appeals held:

> "[T]hat when, as here, the bankruptcy court chooses to sell encumbered property subject to liens, it elects to sell only the bankrupt's equity therein and so, in effect, declines to exercise its exclusive power to deal with the liens, and relegates their holders to the enforcement remedies which would have been available to them, had the lienee's bankruptcy not occurred."

See *Nixon* v. *Michaels*, 38 F. 2d 420 (8th Cir. 1930), and *In re Krull*, 295 Fed. 520 (E.D. N.Y. 1923).

Thus it is submitted that the bankruptcy court had exhausted its jurisdiction over the subject property.

In short appellant's argument that the foreclosure proceeding without an order of the bankruptcy court was invalid is wholly devoid of substance. The property with which we are concerned was clearly not that of the bankrupt debtor (Forest Knolls, Inc.) at the time the foreclosure proceeding was instituted by the

substituted trustee. The sale by the trustee in bankruptcy ratified and confirmed by the bankruptcy court, passed whatever interest the bankrupt debtor had in the property to the purchaser, the appellant in the instant case. See *Coulter* v. *Blieden*, 104 F. 2d 29 (8th Cir.), cert. denied, 308 U.S. 583 (1939); *In re Strunks Lane and Jellico Mountain Coal & Coke Co.*, 64 F. Supp. 731 (D.C. Ky. 1946); *Crane* v. *Crane*, 341 Ill. 363, 173 N.E. 352 (1930).

The appellant does not cite any authority to challenge the foregoing arguments and cases. As was noted by the Court of Appeals of Maryland in its decision, none of the three cases cited by the appellant concerned property sold by a bankruptcy trustee subject to a lien. The *Central Hanover* and *Central States Life Insurance* cases merely support the proposition that the ending of a stay prohibiting commencement or continuation of any action at law or suit or proceeding in equity against a debtor is within the discretion of the Bankruptcy Court. Likewise *In re Long Island Properties, Inc.*, is not in point concerning property sold subject to liens by a trustee in bankruptcy. It held merely that a foreclosure sale in a state court, after the entry of an order in a reorganization proceeding restraining such sale, was void for want of jurisdiction. Nowhere in the opinion is there any reference to retained jurisdiction over property sold by a trustee.

CONCLUSION

The bankruptcy court having ordered and confirmed the sale of the subject property to the appellant, thereby divested itself of any further jurisdiction over the property. The appointment of the substituted

trustee was a matter of public record, was in strict compliance with a right and privilege conferred upon the creditor by the terms of the deed of trust and was in compliance with authority granted by statute and rule. It is respectfully submitted that the appeal should be dismissed because no substantial federal question is to be found within the facts of this case. The opinion of the Court of Appeals of Maryland rests on adequate non-federal grounds. It would not be affected by decision of this Court on any federal question and no plausible foundation has been established to support the naked assertion of substantial federal question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 570

FREDERICK BLAUSTEIN, *Appellant*,

v.

CAESAR L. AIELLO, Substitute Trustee, *Appellee*.

On Appeal from the Court of Appeals of Maryland

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

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OCTOBER TERM

No. 570

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On Appeal from the Court of Appeals of Maryland

BRIEF IN OPPOSITION TO MOTION FOR DISMISS

Appellee's motion to dismiss asserts two reasons for that action: (1) that the decision of the Court of Appeals of Maryland rests upon adequate non-federal grounds; and (2) that there is no plausible foundation for the claim that the Courts of Maryland have invaded the exclusive jurisdiction of the United States Courts. Neither of these arguments is supported by the record:

I. The decision of the Court of Appeals of Maryland necessarily rests upon its determination of federal questions.

The argument in support of appellee's motion to dismiss this appeal makes no claim that Section 187A, Article 16, Annotated Code of Maryland, was not promptly and adequately challenged as invalid under the due process clause of the United States Constitution. Such a claim could not

be made because the Court of Appeals of Maryland (Jurisdictional Statement, Appendix A, pp. 5a, 6a) expressly overruled the appellant's claims under the due process clause. *Charleston Federal Savings & Loan Association v. Alderson*, 324 US 182, 185, 186. Nor does the appellee attempt to defend, as in accordance with the due process clause, a statute which, as does Section 187A, Article 16, Annotated Code of Maryland, forbids the court to give notice to persons whose rights are affected by the proposed action of the Court. Such an attempt would obviously be profitless in the face of this Court's unbroken holding that adequate notice is an essential element of the due process demanded by the Fourteenth Amendment. (See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 112; *Covey v. Town of Somers*, 351 US 141; *Walker v. Hutchinson City*, 352 US 112.)

Rather, the appellee contends that this Court should not consider this patent violation of the requirements of due process, because the decision of the Court of Appeals of Maryland rests upon an adequate non-federal ground. This ground, it is said, is the claim that the provision of the deed of trust allowing the substitution of trustees is binding upon the appellant.

There are two reasons why this argument is unsound. At the out-set, it is not clear whether the argument is that the appellant lacks standing to raise the federal question, or whether the claim is that the act of the original debtor is a waiver of appellant's constitutional rights. In either event, the question is itself one which this Court must finally determine. (See, for example, as to the claim of waiver: *Parker v. Illinois*, 333 US 571, 574, and *Davis v. O'Hara*, 206 US 314, 318, and, as to the claim of lack of standing to

sue. *McCollum* v. *Board of Education*, 333 US 203, 206, 207, and *Coleman* v. *Miller*, 307 US 433, 443, 445, 464.

A second answer lies in the fact that it was not the provision of the deed of trust which divested appellant of his property rights. It was the order of the court substituting the trustee, and the order confirming his sale of the property, both of which were necessarily pursuant to the challenged statute, which create the appearance of legal validity in the acts of the substitute trustee. The assertion by the Maryland Court that the appellant's right to claim the protection of the due process clause is not well taken, is one which this Court clearly has the power and duty to review. *Hansberry* v. *Lee*, 311 US 32; *Straub* v. *City of Bayley*, 355 US 313, 318-320; *Allied Stores of Ohio* v. *Bowers*, 358 US 522.

II. The issue as to whether the Maryland Court of Appeals, by interpreting the order of the United States District Court, has invaded the jurisdiction of that Court is a substantial federal issue.

An important issue in this case is the meaning and effect of Section 148 of the Bankruptcy Act (11 USC 547). This section, an integral part of the entire concept of corporate reorganization proceedings, differs from other stay proceedings in the Bankruptcy Act in that it is self-executing. 11 COLLIER ON BANKRUPTCY (14th Ed.), paragraph 6.12, p. 1798. Other stay proceedings do not become effective unless and until the District Court has exercised its discretion so to order. In contrast, the Section 148 stay becomes effective upon the approval of the petition for reorganization, and continues in effect until and unless the District Court exercises its discretion to terminate the stay.

The underlying issue here is the meaning of the order of the United States District Court which approved the sale

of these properties to Blaustein. (Printed Record Extract, p. E29) If the sale violated that order, it was a nullity. *Kalb* v. *Fuerstein*, 308 US 433, 438, 439.

The issue here presented is not the meaning of the order, but whether the Maryland Courts, unfamiliar with the background of the entire transaction should, in the first instance, have presumed to interpret the order of the United States District Court. As Judge Rifkin expressed it, in *In re Long Island Properties*, 40 F Supp 611, 615 (SD NY 1941), "It is of importance that the federal court be recognized as the only forum in which to litigate the validity and priority of claims to the debtor's property (excepting, in a proper case, wherein the federal court may consent to the commencement of continuation of suit elsewhere.)"

Although we submit that the interpretation of the order upon which the appellee relies would, upon a consideration of all of the background of this case, prove erroneous, we shall not debate the appellee on that issue, since such a debate is a mere evasion of the substantial question. The question is, should the issue be debated in the state courts or should it first be debated in the United States District Court? The mere invoking of the jurisdiction of any other court to hear that argument is necessarily in derogation of the bankruptcy court's exclusive jurisdiction, granted to it in pursuance of Article I, Section 8, clause 2 of the Constitution of the United States.

CONCLUSION

This case presents substantial questions as to the appellee's rights under the due process clause, and as to the extent of the jurisdiction of the bankruptcy courts of the United States. The resolution of such issues is properly

and necessarily the duty of this Court. The motion to dismiss should be over-ruled.

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